Wisma Cosway Management Corp v Dubon Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(A)-768–04 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
9 JANUARY 2018

Civil Procedure — Appeal — Leave to defend — Appellant filed application at High Court for leave to defend and to proceed with counterclaim against respondent in strata tribunal — Whether there was prima facie case that appellant's claim involved legal issue or arguable case — Whether there was prima facie case for leave to be granted — Whether it was in public interest that leave should be given — Whether Limitation Act 1953 applicable for proceedings of strata tribunal — Limitation Act 1953 — Strata Management Act 2013

Wisma Cosway Management Corp ('the appellant') was the management corporation for a strata development known as Wisma Cosway whereas the respondent was a proprietor for Unit No 22.05 on the 22nd Floor of Wisma Cosway. The respondent had filed a claim against the appellant and a developer known as Stephens Properties Sdn Bhd at Strata Tribunal Putrajaya ('the tribunal'). The learned chairman of the tribunal had granted the right to representation pursuant to s 110(2) of the Strata Management Act 2013 ('the Act') to the appellant as well as the respondent and stayed the hearing pending leave being obtained by the appellant pursuant to s 226(3) of the Companies Act 1965 and s 471 of the Companies Act 2016. Subsequently, the appellant had filed an application at the High Court for leave to defend and to proceed with the counterclaim against the respondent in the tribunal. The learned judicial commissioner ('the JC') had dismissed the appellant's application, hence, the present appeal. The grounds of appeal submitted by the appellant were that: (a) the learned JC erred when he failed to realise that the tribunal had already seized jurisdiction pursuant to s 106 of the Act as at 23 August 2017; (b) the learned JC failed to appreciate that the tribunal had also granted the right to representation to the parties pursuant to s 110(2) of the Act and had stayed the proceeding till the issue of leave being resolved by the appellant; (c) the learned JC erred when he failed to appreciate that the High Court lacked the jurisdiction to deal with the matter whilst the tribunal seized jurisdiction to deal with the matter; and (d) the learned JC erred when he decided the claim by the appellant in the tribunal was caught by the Limitation Act 1953 ('the LA') despite the fact that the issue of limitation did not arise. Section 105(2) of the Act clearly stated that the LA did not apply to proceeding in the tribunal.

Held, allowing the appeal with costs of RM15,000 here and below subject to allocator fee:

(1) The appellant had convinced the court that there was a valid point of law needed to be further discussed to resolve the issue whether the appellant would still remain as an unsecured creditor of the respondent and subjected to the remaining assets of respondent to be distributed pari passu amongst the unsecured creditors of the respondent or the amount due from the respondent being a guaranteed sum under the Act afforded the appellant a lawful preference as a secured creditor of the respondent. Most importantly, the issue whether s 77 of the Act was applicable to a wound up company. The court believed that there was a prima facie case that the appellant's claim involved legal issue or an arguable case (see para 27).

(2) It was not disputed that the test was such that if all reliefs sought may be obtained in the winding up court, then leave would be refused. However, the appellant's case could be distinguished in that the management corporation was entitled under the Act to recover from the proprietor the guaranteed sum in a court of competent jurisdiction or before a tribunal as a debt due to it. The court was of the view that, had the learned JC appreciated the fact that the amount due was the guaranteed sum permitted to be recovered under s 77 of the Act, he would have found that there was a prima facie case for leave to be granted to the appellant to proceed with its defence and counterclaim against the respondent at the tribunal proceeding (see paras 28–29).

(3) It was pointed to the court that the argument on the true construction of s 77 of the Act had not been argued before or decided by the apex court. It became more important for the matter to be further ventilated. The outcome may have effect on the stake holders in the strata properties industries including lawyers involved in preparing the legal documents, therefore, it was in the public interest that leave should be given (see para 32).

(4) It had also been pointed out that s 105(2) of the Act clearly stated that the LA shall not apply to proceedings of the tribunal. The court agreed with the appellant that the payment of management charges amounted to a running account such that limitation did not come into play (see para 33).

[Bahasa Malaysia summary

Wisma Cosway Management Corp ('perayu') adalah perbadanan pengurusan untuk pembangunan strata yang dikenali sebagai Wisma Cosway manakala responden adalah pemilik bagi Unit No 22.05 di Tingkat 22 Wisma Cosway. Responden telah memfailkan tuntutan terhadap perayu dan pemaju yang dikenali sebagai Stephens Properties Sdn Bhd di Strata Tribunal Putrajaya

('tribunal'). Pengerusi tribunal yang bijaksana telah memberi hak untuk diwakili menurut s 110(2) Akta Pengurusan Strata 2013 ('Akta') kepada perayu serta responden dan menangguhkan pendengaran sementara menunggu kebenaran diperoleh oleh perayu menurut s 226(3) Akta Syarikat 1965 dan s 471 Akta Syarikat 2016. Selepas itu, perayu telah memfailkan permohonan di Mahkamah Tinggi untuk kebenaran untuk mempertahankan dan meneruskan tuntutan balas terhadap responden di tribunal. Pesuruhjaya kehakiman yang bijaksana ('PK') telah menolak permohonan perayu, oleh itu, rayuan ini. Alasan rayuan yang dikemukakan oleh perayu ialah: (a) PK yang bijaksana terkhilaf apabila beliau gagal menyedari bahawa tribunal telah mengambil bidang kuasa menurut s 106 Akta pada 23 Ogos 2017; (b) PK yang bijaksana gagal untuk menghargai bahawa tribunal juga telah memberikan hak untuk diwakili kepada pihak-pihak menurut s 110(2) Akta dan telah menangguhkan prosiding sehingga isu kebenaran diselesaikan oleh perayu; (c) PK yang bijaksana terkhilaf apabila beliau gagal menghargai bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk menangani perkara itu sementara tribunal mengambil bidang kuasa untuk menangani perkara itu; dan (d) PK yang bijaksana terkhilaf apabila beliau memutuskan tuntutan oleh perayu di tribunal terikat dengan Akta Had Masa 1953 ('LA') walaupun fakta bahawa isu had masa tidak timbul. Seksyen 105(2) Akta dengan jelas menyatakan bahawa LA tidak terpakai untuk prosiding tribunal.

Diputuskan, membenarkan rayuan dengan kos RM15,000 di sini dan di bawah tertakluk kepada fi alokatur:

(1) Perayu telah meyakinkan mahkamah bahawa terdapat perkara perundangan yang sah yang perlu dibincangkan selanjutnya untuk menyelesaikan isu sama ada perayu akan masih kekal sebagai pemiutang tidak bercagar responden dan tertakluk kepada aset-aset lebih responden untuk dibahagikan pari passu di kalangan pemiutang tidak bercagar responden atau jumlah yang terhutang daripada responden adalah jumlah jaminan di bawah Akta memberikan perayu sebagai pilihan yang sah sebagai pemiutang bercagar responden. Paling penting, isu sama ada s 77 Akta boleh diguna pakai untuk syarikat yang tergulung. Mahkamah percaya terdapat kes prima facie bahawa tuntutan perayu melibatkan isu undang-undang atau kes yang boleh dibantah (lihat perenggan 27).

(2) Tidak dinafikan bahawa ujian itu sedemikian rupa jika semua relief yang dipohon boleh diperolehi di mahkamah penggulungan, maka kebenaran akan ditolak. Walau bagaimanapun, kes perayu boleh dibezakan kerana perbadanan pengurusan itu berhak di bawah Akta untuk mendapatkan kembali dari pemilik jumlah jaminan di mahkamah bidang kuasa yang kompeten atau sebelum tribunal sebagai hutang yang terhutang. Mahkamah berpendapat bahawa, jika PK yang bijaksana menghargai hakikat bahawa jumlah yang terhutang adalah jumlah jaminan yang dibenarkan untuk didapatkan kembali di bawah s 77 Akta, beliau akan

mendapati terdapat kes prima facie untuk kebenaran diberikan kepada perayu untuk meneruskan pembelaan dan tuntutan balas terhadap responden di prosiding tribunal (lihat perenggan 28–29).

(3) Adalah ditujukan kepada mahkamah bahawa hujahan mengenai pembinaan sebenar s 77 Akta tidak pernah dipersoalkan sebelum atau diputuskan oleh mahkamah tertinggi. Ia menjadi lebih penting untuk perkara ini lebih dihebahkan. Hasilnya mungkin memberi kesan kepada pemegang amanah dalam industri hartanah strata termasuk peguam yang terlibat dalam penyediaan dokumen undang-undang, oleh itu, adalah demi kepentingan awam bahawa kebenaran harus diberikan (lihat perenggan 32).

(4) Ia juga telah dinyatakan bahawa s 105(2) Akta dengan jelas menyatakan bahawa LA tidak akan terpakai bagi prosiding tribunal. Mahkamah bersetuju dengan perayu bahawa pembayaran caj pengurusan membentuk satu akaun yang tersedia sehingga had masa tidak terpakai (lihat perenggan 33).]

Notes

For cases on leave to defend, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1585–1587.

Cases referred to

Brightvite Sdn Bhd v Pantai Towers Management Corp and another appeal [2018] 5 MLJ 634; [2018] 1 LNS 769, CA (distd)

ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors [2013] 3 MLJ 35; [2013] 1 LNS 99, CA (refd)

Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation) [2017] 6 MLJ 661; [2017] 1 LNS 1576, CA (refd)

Gula Perak Berhad V Datuk Lim Sue Beng & Other Appeals [2018] MLJU 2108; [2018] 1 LNS 1617, FC (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650; [2013] 3 CLJ 813; [2013] 1 LNS 1, CA (refd)

Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd [2014] 4 MLJ 886; [2014] 7 CLJ 202, CA (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 226(3)
Companies Act 2016 s 471
Limitation Act 1953 s 6(1)(d)
Strata Management Act 2013 ss 45(5), (6), 77, 77(3), 105(2), 106, 110(2)

Appeal from: Companies (Winding-Up) No JA-28PW-99–11 of 2017 (High Court, Johor Baru)

Sivabalan (Goh Wan Ping with him) (Mastura Partnership) for the appellants. Andrew Teh (Tan Chong Pei with him) (Wong Lu Peen & Tunku Alina) for the respondent.

Kamaludin Md Said JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of High Court in which the learned judicial commissioner ('learned JC') had dismissed the appellant's application in encl 1 for leave to defend and to proceed with the counterclaim against the respondent in the Strata Tribunal Putrajaya (Suit Claim No TPS/W-2116–7/17).

[2] The learned chairman in the Strata Tribunal had granted the right to representation pursuant to s 110(2) of the Strata Management Act 2013 ('the Act') to the appellant as well as the respondent and stayed the hearing pending leave being obtained by the appellant pursuant to s 226(3) of the Companies Act 1965 and s 471 of the Companies Act 2016.

BRIEF FACTS

[3] The appellant is the management corporation for a strata development known as 'Wisma Cosway' located at No 88, Jalan Raja Chulan, 50200 Kuala Lumpur.

[4] The respondent is a proprietor for Unit No 22.05 on the 22nd Floor of Wisma Cosway and pursuant to the Act, the respondent is required to pay the monthly maintenance charges and sinking fund to the appellant.

[5] On or about 18 January 2000, the respondent was wound up by the High Court wherein two individuals named Ooi Chee Kun and Khoo Pek Ling were appointed as the liquidators for the respondent and to date the respondent refuses to pay the monthly maintenance charges on grounds that it has been wound up.

[6] On or about 27 July 2017, the respondent initiated a claim against the appellant and a developer known as Stephens Properties Sdn Bhd at Strata Tribunal Putrajaya vide Claim No TPS/W-2116–17/17 claiming the following reliefs:

(a) an order to compel Stephens Properties to execute the memorandum of transfer for the strata title issued for parcel unit No 22.05, 22nd Floor, Wisma Cosway, No 88, Jalan Raja Chulan, 50200 Kuala Lumpur without the imposition of any administrative and application fees amounting to 1% of the purchase price; and

(b) an order to compel the appellant to issue a letter of clearance upon the respondent's payment of RM43,805.34 being settlement of the outstanding outgoings that is lawfully due to the second respondent as at 31 May 2017, the latest practicable date.

[7] On or about 23 August 2017, the appellant filed a defence and counterclaim against the respondent for the outstanding outgoings of RM183,201.37 from 1 August 2002 until 3 August 2017 being the sum owed and due by the respondent for maintenance fee, sinking fund and other charges in respect of the said unit pursuant to the Act.

THE APPELLANT'S LEAVE APPLICATION

[8] The appellant's leave application filed on 2 November 2017 is for the following orders:

(a) *bahawa pemohon diberikan kebenaran untuk memfailkan kertas-kertas kausa termasuk pembelaan dan tuntutan balas terhadap responden di Strata Tribunal, Putrajaya melalui Tuntutan No TPS/W-216–7/17 dan/atau di mana-mana Mahkamah Sivil termasuk semakan kehakiman;*

(b) *kos hendaklah menjadi kos dalam kausa; dan*

(c) *apa-apa perintah lanjutan dan/atau Mahkamah Yang Mulia ini adalah dianggap sesuai dan/atau sebaliknya wajar.*

[9] The leave application is supported by the affidavit affirmed by Yap Kuen Fah dated 2 November 2017. The respondent opposed the leave application by filing its affidavit in reply affirmed by Khoo Pek Ling dated 20 November 2017 and the appellant filed its affidavit in reply dated 29 November 2017.

[10] The leave application was heard by the court and the learned JC dismissed the appellant's leave application with cost RM4,000.

DECISION OF THE HIGH COURT

[11] Having considered the facts and circumstance of the appellant's case and applied the test that the appellant's claim can be dealt with adequately in the winding up court, the learned JC refused to grant leave to the appellant. The learned JC held that the appellant had failed to satisfy the requirement for

him to grant the appellant with leave to proceed with a claim against the respondent. The court also held that the appellant failed to establish a prima facie case that its claim against the respondent involves a serious and complex legal and factual issues (the Court of Appeal's cases of *Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation)* [2017] 6 MLJ 661; [2017] 1 LNS 1576 and *Mesuntung Property Sdn Bhd v Kimlin Housing Development Sdn Bhd* [2014] 4 MLJ 886; [2014] 7 CLJ 202 were followed).

[12] The reasons given by the learned JC in dismissing the appellant's leave application can be summarised as follows:

(a) the appellant's claim for the outgoings against the respondent based on the statement of account prepared as at 31 May 2017 is time-barred under s 6(1)(d) of the Limitation Act 1953;

(b) the appellant is an unsecured creditor of the respondent and the remaining assets of the respondent must be distributed pari passu amongst the unsecured creditors of the company;

(c) it will be unfair and prejudicial to the other unsecured creditors of the respondents if the appellant is granted with leave to proceed with the counterclaim at the tribunal proceedings, as it will afford the appellant an unlawful preference as an unsecured creditor;

(d) by allowing the application, the court will fortuitously allow the appellant to circumvent the ordinary winding up process without filing a proof of debt;

(e) the counterclaim at the tribunal proceeding which the appellant is seeking leave from court is monetary in nature and the correct step which should be taken by the appellant in the orderly winding up process is to file a proof to the liquidators of the respondent;

(f) the dispute between the appellant and the respondent does not involve a complex issue of facts and law. The appellant's claim can be sufficiently dealt by the winding up court; and

(g) once the monetary dispute between parties is decided by the court, the claim at the tribunal proceeding will be deemed academic and will not necessary to be continued.

THIS APPEAL

[13] The appellant sets out various grounds in its memorandum of appeal. In summary, the reasons warranting appellate intervention are as follows:

(a) the learned JC erred when he failed to realise that the Strata Tribunal had already seized jurisdiction pursuant to s 106 of the Strata Management Act 2013 as at 23 August 2017;

(b) the learned JC failed to appreciate that the Strata Tribunal had also granted the right to representation to the parties pursuant to s 110(2) of the Strata Management Act 2013 and had stayed the proceeding till the issue of leave being resolved by the appellant;

(c) the learned JC erred when he failed to appreciate that the High Court lacked the jurisdiction to deal with the matter whilst the Strata Tribunal seized jurisdiction to deal with the matter; and

(d) the learned JC erred when he decided the claim by the appellant in the Strata Tribunal is caught by the Limitation Act 1953 despite the fact that the issue of limitation does not arise. Section 105(2) of the Strata Management Act 2013 clearly states that Limitation Act 1953 does not apply to proceeding in the Strata Tribunal.

[14] The appellant and the respondent had filed their written submissions. We had read the written submissions. The counsels had also made oral submissions before us.

[15] Having heard the submissions, it was our unanimous decision that the appellant's appeal should be allowed. We gave our reasons.

OUR DECISION

[16] At the outset, we gave our view to learned counsel for the appellant that the appellant's counterclaim filed at the Tribunal against the respondent would be an abuse of court process on reason that since there is already in place a statutory mechanism for resolving disputes and debts by way of lodgment of proof of debts. The respondent is in liquidation and if the claim can be obtained in the liquidation proceeding through filing of a proof of debt, leave ought to be refused. The onus is on the appellant to demonstrate why it is more appropriate in this particular facts and circumstance to proceed by separate civil action instead of by lodgment of a proof of debt.

[17] The appellant's counsel responded by submitting that the counterclaim by the appellant in Strata Tribunal is to claim the outstanding services charges, sinking fund, quit rent, fire insurance, utility, interest and others for the sum of RM183,201.37 as at 3 August 2017 and the said sum is a guaranteed sum by the respondent being the proprietor for Unit No 22.05 pursuant to s 77 of the Act.

[18] He explained that s 77 of the Act states that:

> 77(1) The payment of any amount lawfully incurred by the management corporation or the subsidiary management corporation in the course of the exercise of any of its powers or functions or carrying out its duties or obligations shall by

A virtue of this section be guaranteed by the proprietors for the time being constituting the management corporation or the subsidiary management corporation.

(2) Each proprietor shall be liable under such guarantee referred to in subsection (1) only for such proportion of the money so incurred as the share units of his parcel or the provisional share units of his provisional block bear to the aggregate share units.

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(3) Where any proprietor has not discharged or fully discharged his liability for the purpose of subsection (1), the management corporation shall be entitled to recover from the proprietor in a court of competent jurisdiction or before a Tribunal as a debt due to it.

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[19] He submitted that by sub-s (3) above, it is very clear that any amount lawfully incurred by the appellant being the management corporation in this case is guaranteed by the proprietors ie the respondent being the proprietor and the guarantor of the account for Unit No 22.05 and therefore is legally bound to settle the outstanding sum of RM183,201.37 as at 3 August 2017. In other words, the said outstanding sum is a guaranteed sum be paid to the appellant.

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[20] It was further submitted that the intention of s 77 of the Act is to make the proprietor liable to pay amount lawfully incurred by the management corporation. In this case the outstanding services charges, sinking fund, quit rent, fire insurance, utility are the amount incurred by the appellant as the management corporation which are guaranteed by the respondent. In other words, the guaranteed amount incurred is attached to the property held by the owner of which the respondent has not discharged or fully discharged his liability to settle the amount lawfully incurred by the appellant.

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[21] It is the appellant's case that it has the right under the statute to claim the outstanding sum of RM183,201.37 as at 3 August 2017 against the respondent and that the respondent cannot compel Stephens Properties to execute the memorandum of transfer for the strata title issued for parcel unit No 22.05 and compel the appellant to issue a letter of clearance for the transfer of the said unit without the outstanding sum owed and due to the appellant being the guaranteed amount under the said Act be paid to the appellant. The issue of the appellant filing a proof of debt does not arise or become a determining factor for the learned JC to refuse leave. The appellant had shown a prima facie case and leave must be given by the court for the appellant to proceed with its defence and counterclaim against the respondent at the Strata Tribunal proceeding.

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[22] The appellant had also submitted that the learned JC erred in dismissing the appellant's application on the grounds that the appellant's claim was time-barred by Limitation Act 1953. Counsel referred to s 105(2) of the Act which clearly states that 'For avoidance of doubt, the Limitation Act 1953

[Act 254] shall not apply to proceedings of the Tribunal'. It is the appellant's case that the amount due is attached to the property and the cause of action to recover the amount due and payable to the management corporation follows the property. The cause of action commences from the date the proprietor disposes the property.

[23] We are minded that there is a presumption that the judge had rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and difference of opinion (see *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150).

[24] It is trite that an appellate court will be slow in intervening in the discretionary exercise of the trial court (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 3 CLJ 813; [2013] 1 LNS 1; *ECM Libra Investment Bank Bhd v Foo Ai Meng & Ors* [2013] 3 MLJ 35; [2013] 1 LNS 99).

[25] We are also minded that generally the threshold for court in exercising its power to grant leave is very low. The function of the court in exercising its power to grant leave is to sieve through the application before it and determine that the application is not frivolous and vexatious and there is an arguable case to merit further argument at the trial.

[26] The appellant's leave application is made pursuant to s 226(3) of the Companies Act 1965 and s 471 of the Companies Act 2016 which provide as follows:

s 226 of Act 1965

(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —

(a) By leave of the Court; and

(b) In accordance with such terms as the Court imposes.

s 471 of Act 2016

(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

(2) The application for leave under subsection (1) shall be made in the Court granting winding up order and shall be served on the liquidator.

A (3) The office copy of the order for leave under subsection (1) shall be lodge by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

B **[27]** It was not disputed that the issue related to s 77 of the Act in particular had been canvassed before the learned JC. It was argued that the amount due from the respondent is a guaranteed sum under the said s 77 which is a statutory right to claim. Based on that argument, it is our preliminary view that the appellant had convinced us that there is a valid point of law needed to be C further discussed to resolve the issue whether the appellant would still remain as an unsecured creditor of the respondent and subjected to the remaining assets of respondent to be distributed pari passu amongst the unsecured creditors of the respondent or the amount due from the respondent being a guaranteed sum under the Act afforded the appellant a lawful preference as a D secured creditor of the respondent. Most importantly, the issue whether s 77 of the Act applies to a wound up company. We believe that there is a prima facie case that the appellant's claim involves legal issue or an arguable case.

E **[28]** It not disputed that the test is such that if all reliefs sought may be obtained in the winding up court, then leave will be refused. However, the appellant's case can be distinguished in that the management corporation is entitled under the Act to recover from the proprietor the guaranteed sum in a court of competent jurisdiction or before a Tribunal as a debt due to it. In F another Court of Appeal's case of *Brightvite Sdn Bhd v Pantai Towers Management Corp and another appeal* [2018] 5 MLJ 634; [2018] 1 LNS 769, it was held that the filing of the claim vide the proof of debt form does not preclude the MC from seeking recovery against the appellants particularly when the debt remains unpaid to date vis a vis Metroplex. The filing of the G proof of debt form against Metroplex does not operate as an estoppel against recovery of the debt from the appellants in light of the express statutory provisions of s 45(5) and (6) of the Act. Debt necessarily mean that there is an undisputed debt. If the debt has been disputed in a bona fide manner then there is a duty and obligation for the management corporation to resolve the H dispute preferably by mediation or arbitration within the members themselves failing which due process of law has to be adhered to.

[29] Be that as it may the *Brightvite*'s case is distinguished from its facts. There, the issue involves the reading of s 45(5) and (6) of the Act. It does not I relate to s 77 of the Act. Premised on the argument in relation to s 77 of the Act and the 'guaranteed sum' it is our view that, had the learned JC appreciated the fact that the amount due is the guaranteed sum permitted to be recovered under the Act by virtue of s 77 of the Act, we believed he would have found that there is a prima facie case for leave to be granted to the appellant to proceed

with its defence and counterclaim against the respondent at the Strata Tribunal proceeding. A

[30] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is; and this is primarily done by reference to the words used in the provision (see the Federal Court in *Gula Perak Berhad v Datuk Lim Sue Beng & Other Appeals* [2018] MLJU 2108; [2018] 1 LNS 1617). The Federal Court cited *Crease on Legislation* (9th Ed 2008) at p 611 which states: B

> The cardinal rule for construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the Court is to interpret legislation 'according to the intent of them that made it' and that intent is to be deduced from the language used. C

[31] Section 77 of the Act uses the words 'shall by virtue of this section be guaranteed by the proprietors'. It must be accepted at the moment that the Act imposes a mandatory obligation on the proprietors to pay any amount incurred by the management corporation in the course of the exercise of any of its powers or functions or carrying out its duties or obligations. It is our preliminary view that the law is such that the proprietors of strata units in the development project must settle any outstanding amount owed to the management corporation before they can sell or transfer the properties to third parties. Therefore, the settlement of any outstanding amount due and owing by the proprietors to the management corporation must be observed or followed before the transfer of the properties can be affected or executed. This means that it has to be a conditioned precedent in the legal documents of transfer or sales of strata unit shares prepared by lawyers. D E F

[32] It was pointed to us that the argument on the true construction of s 77 of the Act has not been argued before or decided by the apex court. It becomes more important for the matter to be further ventilated. We are of the view that the outcome may have effect on the stake holders in the strata properties industries including lawyers involve in preparing the legal documents, therefore, it is in the public interest that leave should be given. G H

[33] It had also been pointed out that s 105(2) of the Act clearly states that the Limitation Act 1953 (Act 254) shall not apply to proceedings of the tribunal. We would agree with the appellant that the payment of management charges amounts to a running account such that limitation does not come into play. I

[34] In that premise, we allowed the appellant's appeal with cost of RM15,000 here and below subject to allocator fee and the deposit is to be refunded to the appellant.

Appeal allowed with costs of RM15,000 here and below subject to allocator.

Reported by Dzulqarnain Ab Fatar